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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-168

KAMEI-AUTOKOMFORT AND
SUPERIOR INDUSTRIES, INC.,
Petitioners,

vs.

EURASIAN AUTOMOTIVE PRODUCTS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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I.

STATEMENT OF THE CASE.

This is a patent infringement action relating to U. S. Patent No. 3,312,124 directed to a steering wheel cover allegedly designed to "eliminate inconveniences resulting from *extreme steering wheel temperatures.*" (emphasis added) (Appendix 3, p. 43)

After a trial, the United States District Court for the Northern District of California found (Finding of Fact No. 22) that the device was not obvious because; "The ability of the cover to breath through a non-porous outer skin when gripped by a driver was a result both 'unusual and surprising' in the steering wheel cover art." (Appendix 3, p. 59)

The Ninth Circuit Court of Appeals carefully reviewed the record below and, relying on prior art which was given "little, if any, weight" by the District Court (Appendix 1, p. 35), concluded:

> "[w]e believe that whether the patented covers breathe or absorb . . . the covers perform in the manner one would expect, given the prior art." (Appendix 1, p. 39)

II.

PETITIONERS HAVE FAILED TO STATE ANY REASON FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

Supreme Court Rule 19 provides that certiorari is to be granted "only where there are special and important reasons".

Petitioners do not contend that there is a conflict with another Court of Appeals, or that the Court of Appeals decided an important question of federal law which has not been but should be settled by this Court, or that the decision of the Court of Appeals conflicts with any applicable decision of this Court—reasons set forth in Supreme Court Rule 19 for consideration in granting certiorari. Instead, Petitioners claim they were deprived of Due Process by the Ninth Circuit Court of Appeals.

A. This Case Presents No Due Process Issue.

Petitioners for the first time[1] attempt to raise an argument based on the Due Process clause of the Fifth Amendment. Petitioners' argument is:

a. The Ninth Circuit's opinion was written by a Senior United States District Judge from Lincoln, Nebraska sitting by designation pursuant to 28 U. S. C. § 292, rather than by a Ninth Circuit Judge (Petition for Certiorari, p. 13);

1. No issue of Due Process was raised before the Ninth Circuit Court of Appeals either at the time of oral argument or at the time of Petitioners' Petition for Rehearing.

b. The Judge's background was in the Eighth Circuit (Petition for Certiorari, p. 13); and

c. The Eighth Circuit Court of Appeals is well known as the "graveyard of patents". (Petition for Certiorari, p. 16)

While Petitioners' apparent high regard for Ninth Circuit Judges is commendable, the Constitution does not prohibit assignment of District Court judges to sit on Courts of Appeal, nor does the Constitution require circuit purity as Petitioners apparently feel. In *McDowell* v. *United States*, 159 U. S. 596, 598-99 (1895), this Court said:

> "There is no constitutional provision restricting the authority of a District Judge to any particular territorial limits. District Courts are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress."

And in *Glidden Company* v. *Zdanok*, 370 U. S. 530, 584 (1962), this Court granted certiorari to consider the validity of designating a judge of the Court of Claims and a retired judge of the Court of Customs and Patent Appeals to perform jurisdictional duties in a Court of Appeals, and concluded:

> "Whether they should be given such assignment may be and has been a proper subject for congressional debate, e.g., 62 Cong. Rec. 190-191, 207-209 (1921), but once legislatively resolved *it can scarcely rise to the dignity of a constitutional question.*" (emphasis added)

B. The Court of Appeals Followed the Relevant Statutory and Decisional Law.

Petitioners do not contend that the Court of Appeals failed to follow the leading precedent of *Graham* v. *John Deere & Company*, 383 U. S. 1 (1966) or any other controlling law. Indeed, it is clear from the Petition for Certiorari (p. 18) that the Court of Appeals specifically addressed the underlying factual inquiries required by *Graham* v. *John Deere* in finding the

District Court clearly erroneous. The Court of Appeals then made the ultimate conclusion of law under 35 U. S. C. § 103 that the patent in suit was obvious in view of prior art which was given "little, if any, weight" by the District Court. (Appendix 1, p. 35)

In essence, Petitioners are simply saying they do not agree with what the Court of Appeals did. However, Petitioners fail to give this Court any "special and important" reason to review the action of the Court of Appeals.

III.

CONCLUSION.

For the foregoing reasons, Respondent respectfully requests denial of the petition.

Respectfully submitted,

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